

Citation: 2013 BCSECCOM 357

Headnote

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – British Columbia Instrument 81-513 *Self-Dealing* – s.8 Fees on investment for mutual fund - A mutual fund manager seeks relief from the requirement for a mutual fund to disclose in a prospectus a fee paid to a related person of the mutual fund – The fund is a not a reporting issuer; investors in the fund are all accredited investors or are purchasing under the offering memorandum exemption; the subscription agreement, offering memorandum and/or managed account agreement (as applicable) discloses the agreement to pay fees to a related person; investors are given notice of the fees and time to redeem out of the funds

Applicable Legislative Provisions

British Columbia Instrument 81-513 *Self-Dealing*

August 21, 2013

In the Matter of
the Securities Legislation of
British Columbia
(the Jurisdiction)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Nicola Wealth Management Ltd.
(the Filer)

Background

- ¶ 1 The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) that provisions of the Legislation that restrict a mutual fund from making an investment a consequence of which a related person of the mutual fund will receive a fee or other compensation unless the fee is paid under a contract that is disclosed in a preliminary prospectus or prospectus filed by the mutual fund and accepted by the executive director (the Disclosure Requirement) will not apply to the NWM Funds (defined below) in respect of the SPIRE Fees (defined below) and Future Fees (defined below) (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the British Columbia Securities Commission is the principal regulator for this application, and
- (b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 Passport System (MI 11-102) is intended to be relied upon in Saskatchewan, New Brunswick and Newfoundland and Labrador.

Interpretation

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

- ¶ 3 This decision is based on the following facts represented by the Filer:

The Filer

1. the Filer is a company established under the laws of British Columbia with its head office located in Vancouver, British Columbia;
2. the Filer is registered under applicable securities legislation in (i) British Columbia as a Portfolio Manager, Investment Fund Manager and Exempt Market Dealer; (ii) Alberta as a Portfolio Manager and Exempt Market Dealer; (iii) Ontario as a Portfolio Manager, Investment Fund Manager and Exempt Market Dealer; and (iv) Newfoundland and Labrador as a Portfolio Manager, Investment Fund Manager and Exempt Market Dealer;
3. the Filer is not a reporting issuer in any jurisdiction of Canada;
4. the Filer is not in default of securities legislation in any jurisdiction of Canada;

The NWM Funds

5. the Filer has established a number of mutual fund trusts under the laws of British Columbia (the Current NWM Funds) and may create additional mutual fund trusts from time to time by way of amendment to the declaration of trust governing the existing funds (the Future NWM Funds) (collectively, the NWM Funds); the Current NWM Funds are not in default of securities legislation in any jurisdiction in Canada;
6. the Filer is the investment fund manager and portfolio manager for the Current NWM Funds and will be the investment fund manager and portfolio manager for the Future NWM Funds;
7. the trustee and custodian of the Current NWM Funds is CIBC Mellon Trust Company, a trust company existing under the laws of Canada;
8. the NWM Funds will not be reporting issuers in any jurisdiction of Canada for the foreseeable future and therefore will not be subject to National Instrument 81-102

Mutual Funds and National Instrument 81-107 Independent Review Committee for Investment Funds;

9. the Disclosure Requirement does not apply to the NWM Funds in Canadian jurisdictions other than the Jurisdiction, Saskatchewan, New Brunswick and Newfoundland and Labrador;
10. one or more of the Current NWM Funds wishes to and the Future NWM Funds may wish to make investments (the SPIRE Investments) in SPIRE Real Estate Limited Partnership (SPIRE LP) and SPIRE US Limited Partnership (SPIRE US); SPIRE LP and SPIRE US are engaged in the business of acquiring, managing and disposing of commercial and other real property in Canada and the United States;
11. SPIRE LP and SPIRE US are managed by the general partner, SPIRE General Partner Ltd. (SPIRE GP), which in turn currently subcontracts out management of SPIRE LP and SPIRE US to Nicola Crosby Real Estate Management Ltd. (SPIRE Manager) and records keeping services to the Filer; the Filer currently owns approximately 90% of SPIRE GP and 36% of SPIRE Manager;
12. SPIRE GP and SPIRE Manager are related persons of the NWM Funds for the purposes of the Disclosure Requirement;
13. SPIRE GP and SPIRE Manager will receive asset management, incentive, acquisition, and administration fees as a consequence of the NWM Funds investing in SPIRE LP and/or SPIRE US (the SPIRE Fees);
14. the Disclosure Requirement provides that a mutual fund must not make an investment in consequence of which a related person of the mutual fund will receive a fee or other compensation unless the fee is paid under a contract that is disclosed in a preliminary prospectus or prospectus filed by the mutual fund and accepted by the executive director;
15. the Filer is seeking relief from the Disclosure Requirement in respect of the NWM Funds because, in the absence of the Exemption Sought, the NWM Funds would be prohibited from making an investment in SPIRE LP or SPIRE US unless the NWM Funds filed a preliminary prospectus or prospectus that discloses that the SPIRE Fees would be charged by SPIRE GP and SPIRE Manager to SPIRE LP and SPIRE US, a portion of which SPIRE Fees would ultimately be borne by the NWM Funds;
16. the Filer also is seeking relief from the Disclosure Requirement in respect of NWM Funds that may invest (the Affiliate Investments) in limited partnerships, corporations, trusts or other entities (the Affiliated Entities) other than SPIRE LP and SPIRE US that charge asset management, incentive, acquisition, administration or other fees where all or a portion of such fees would ultimately be received by related persons (the Future Fees);
17. securities of each NWM Fund have been and will be distributed in Canada:

- (a) primarily to persons who would qualify as an accredited investor, as such term is defined in National Instrument 45-106 *Prospectus and Registration Exemptions* (NI 45-106) (accredited investors) in reliance on the accredited investor exemption in section 2.3 of NI 45-106; and
- (b) in some cases to persons who are not accredited investors in reliance on the offering memorandum exemption in section 2.9 of NI 45-106,

and the securities of each NWM Fund will not be qualified for sale under a prospectus;

- 18. all investors in the Current NWM Funds are clients of the Filer and have entered into either managed account agreements or advisory account agreements with the Filer;
- 19. over 95% of the investors in the Current Funds have entered into managed account agreements and therefore, except in Ontario with respect to securities of investment funds, the Filer is considered to be an accredited investor when subscribing for securities on behalf of the managed accounts;
- 20. the Filer expects that for the foreseeable future all investors in the NWM Funds will be clients of the Filer;
- 21. in respect of the SPIRE Investments and Affiliate Investments, the Filer and its related parties will collect either SPIRE Fees or Future Fees (as applicable) (Bottom Fees) or similar fees from the NWM Funds (Top Fees) but not both Bottom Fees and Top Fees;
- 22. an offering memorandum in Form 45-106F2 is prepared annually by the Filer in respect of the NWM Funds and filed with the applicable securities regulator when used in connection with an offering of units of an NWM Fund;
- 23. the Filer submits that since all subscribers to the NWM Funds would be either accredited investors or purchasers under an offering memorandum, it would not be prejudicial to the public interest to disclose in the applicable offering memorandum, subscription agreement and account agreement that the NWM Funds may make the SPIRE Investments or Affiliate Investments that are charged the SPIRE Fees or Future Fees, instead of disclosing in a preliminary prospectus or prospectus ;
- 24. upon receipt of the Exemption Sought and prior to any SPIRE Investments or Affiliate Investments, the Filer will notify all of its clients by e-mail that, effective immediately, the managed and advisory account agreements are updated such that the NWM Funds may make SPIRE Investments and/or Affiliate Investments and that related parties will receive the SPIRE Fees and/or Future Fees; and
- 25. no SPIRE Fees and/or Future Fees will be paid in respect of the SPIRE Investments or Affiliate Investments before September 30, 2013 and investors in the Current NWM Funds that currently intend on making the SPIRE Investments and/or Affiliate Investments will be able to redeem their units before September 30, 2013 in

accordance with the weekly redemption rights accompanying the units of such Current NWM Funds.

Decision

¶ 4 The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

1. each NWM Fund that is relying on the Exemption Sought uses a subscription agreement for subscribers that discloses that the SPIRE Fees and/or Affiliate Fees will be paid to a related person as a consequence of that NWM Fund making a SPIRE Investment or Affiliate Investment (the Required Disclosure);
2. the Required Disclosure is contained in the managed and advisory account agreements of the Filer;
3. the Required Disclosure is contained in any NWM Fund offering memorandum used in conjunction with the exemption in section 2.9 of NI 45-106;
4. each Fund that is relying on the Exemption Sought remains a non-reporting issuer;
5. all investors in an NWM Fund that is relying on the Exemption Sought are either accredited investors at the time of purchase of the Fund's securities or purchasers receiving an offering memorandum with the Required Disclosure; and
6. each NWM Fund that is relying on the Exemption Sought will provide the Required Disclosure to the regulator or securities regulatory authority of the Jurisdiction, Saskatchewan, New Brunswick or Newfoundland and Labrador upon request.

Peter Brady
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British Columbia Securities Commission